IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-792, 72-802

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; its Commissioner, ABE LAVINE; NEW YORK STATE DEPARTMENT OF INDUSTRIAL RELATIONS; its Commissioner, LOUIS LEVINE; ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES and its Commissioner, GEORGE C. SIPPRELL,

Appellants,

v.

DOLORES DUBLINO, DORIS JIMERSON, VIRGINIA MICHAEL, JANIE LEE PHILLIPS and MARIA MARFOGLIA, on behalf of themselves and their minor children,

Appellees.

Onondaga County Department of Social Services and its Commissioner, JOHN L. LASCARIS,

Appellants,

v.

DOLORES DUBLINO, DORIS JIMERSON, VIRGINIA MICHAEL, JANIE LEE PHILLIPS and MARIA MARFOGLIA, on behalf of themselves and their minor children,

Appellees.

On Appeal from the United States District Court For the Western District of New York

BRIEF FOR APPELLANTS, THE ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES AND ITS COMMISSIONER, JOHN L. LASCARIS.

PHILIP C. PINSKY, ESQ.
Onondaga County Welfare Attorney
Counsel for Appellants, Onondaga County Department of Social Services and its Commissioner, John L. Lascaris
600 South State Street
Syracuse, New York 13202
Tel.: (315) 477-7125

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement	3
Summary of Argument	11
Argument:	
I. If the Complaint contains "substantial" constitutional questions, then this Court has jurisdiction over the direct appeal; if not, then the case should be remanded with directions to dismiss the Complaint for want of jurisdiction	12
II. The Federal Work Incentive Program was not intended to preempt State Employment and Job Training Rules that purport to govern eligibility for AFDC and AFDC-U Benefits	16
Conclusion	28

CITATIONS

Cases:

Aguayo vs. *Richardson*, —— F. 2d ——, decided January 18, 1973 ..... 17, 25, 27

Bailey vs. *Patterson*, 369 U. S. 31 (1962) 15

Board of Regents vs. *New Left Education Project*, 404 U. S. 541 (1972) 15

Flast vs. *Cohen*, 392 U. S. 83 at 91, fn. 4 (1968) .. 12, 13, 14

Florida Lime & Avocado Growers, Inc. vs. *Jacobsen*, 362 U. S. 73 at 80-81, 84 (1960) 13, 14

Pa

Florida Lime & Avocado Growers, Inc. vs. *Paul*, 373 U. S. 132 (1963) at 146 1

Hagans vs. *Wyman*, —— F. 2d ——, decided January 3, 1973, citing *Almenares* vs. *Wyman*, 453 F. 2d 1075, 1082 (2d Cir. 1971) cert. denied, 405 U. S. 944 (1972) 1

Johnson vs. *New York State Education Department*, 449 F. 2d 871 (2d Cir. 1971), remanded to determine mootness, —— U. S. —— 15 (1972) 1

Paul vs. *U. S.*, 371 U. S. 245 at 250 (1963) 1

Pennsylvania Public Utility Commission vs. *Pennsylvania R. Co.*, 382 U. S. 281 (1965) 1

Phillips vs. *U. S.*, 312 U. S. 246 (1941) 1

Piedmont & Northern R. Co. vs. *U. S.*, 280 U. S. 469 (1930) 1

Rockefeller vs. *Catholic Medical Center*, 397 U. S. 820 (1970) 1

Rosado vs. *Wyman*, 397 U. S. 397 (1970) 1

Schwartz vs. *Texas*, 344 U. S. 199 at 202 (1952) 1

Slagle vs. *State of Ohio*, 366 U. S. 259 at 264 (1961) .. 1

Swift & Company vs. *Wickham*, 382 U. S. 111 (1965) 13, 1

Townsend vs. *Swank*, 404 U. S. 282 (1971) 1

U. S. vs. *Georgia Public Service Commission*, 371 U. S. 285 at 287-288 (1963) 1

Wilson vs. *City of Port Lavaca*, 391 U. S. 352 (1968) 1

Woolfolk vs. *Brown*, 325 F. Supp. at 1169 1

Woolfolk vs. *Brown*, 325 F. Supp. 1162, affirmed, 456 F. 2d 652 (4th Cir. 1972), cert. denied, —— U. S. —— (1972) 1

Zemel vs. *Rusk*, 381 U. S. 1 at 5-6 (1965) 13,

Page

Statutes:

28 U. S. C. § 1253 2
§ 1343 14
§ 1343 (3) 14, 15
42 U. S. C. § 602 (19) (F) 16
§ 602 (a) (8) 18
§ 1983 14
§ 607 (b) 18
§ 632 (a) 21
18 N. Y. C. R. R., § 352.20 (b) (2) 22
§ 385.1 (a) 23
§ 385.3 (b) (3) 23
N. Y. Laws of 1971, Chapters 101 and 102 ..... 3, 8
Supremacy Clause of Article VI of the Constitution .. 3, 4
§ 131 (10) of the Social Services Law, enacted by Chapter 946 of the Laws of 1971 9
Chapter 685, Laws of 1972 9
New York State's Regulation 385.6 7
New York State's Regulation 385.7 (formerly 385.6) 25, 26
§ 402 (19) (F) Social Security Act 11
State Social Services Law § 131, Sub. 4 ..... 23, 24

Miscellaneous:

87th Cong., 1st Sess., p. 3 (1961) 19
New York Work Rules 11, 16, 20, 24
Federal Work Incentive Program 16, 20

IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-792, 72-802

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; its Commissioner, ABE LAVINE; NEW YORK STATE DEPARTMENT OF INDUSTRIAL RELATIONS; its Commissioner, LOUIS LEVINE; ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES and its Commissioner, GEORGE C. SIPPRELL,

Appellants,

v.

DOLORES DUBLINO, DORIS JIMERSON, VIRGINIA MICHAEL, JANIE LEE PHILLIPS and MARIA MARFOGLIA, on behalf of themselves and their minor children,

Appellees.

Onondaga County Department of Social Services and its Commissioner, JOHN L. LASCARIS,

Appellants,

v.

DOLORES DUBLINO, DORIS JIMERSON, VIRGINIA MICHAEL, JANIE LEE PHILLIPS and MARIA MARFOGLIA, on behalf of themselves and their minor children,

Appellees.

On Appeal from the United States District Court For the Western District of New York

---

BRIEF FOR APPELLANTS, THE ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES AND ITS COMMISSIONER, JOHN L. LASCARIS.

OPINION BELOW

The opinion of the District Court (Jurisdictional Statement of State Appellants, pp. 20-38) is reported at 348 F. Supp. 290.

JURISDICTION

An application made to the United States District Judge for the convening of a three-judge panel was granted on August 6, 1971 in an opinion which determined that the constitutional questions alleged in the complaint were "substantial" (A. 34-39 [1]). Following numerous depositions and other pretrial proceedings, the three-judge court received a stipulation of facts (A. 150-201), exhibits (listed at A. 202), and briefs and issued an opinion dated July 28, 1972. A final judgment was entered on August 25, 1972, (see Appendix to Jurisdictional Statement of State Appellants, pp. 41-43), [2] which enjoined the operation of a portion of certain New York Statutes and Regulations promulgated by the New York State Department of Social Services, upon the ground that the statute and regulations conflicted with the federal Social Security Act and were therefore invalid under the Supremacy Clause of the Federal Constitution. The district court also considered the constitutional questions alleged in the first three causes of action of the complaint (A. 30-31), and dismissed them, with one exception from which the state and county appellants have not appealed. (Jurisdictional Statement of State Appellants, p. 43).

Appeals by the defendants were lodged in this court in accordance with the Direct Appeal Statute, 28 U.S.C. §1253. This Court postponed consideration of the jurisdictional question to the hearing of the case on the merits.

1/ References are to the printed Appendix jointly filed in Nos. 72-792 and 72-802.

2/ A minor amendment to the final judgment was made by order dated October 18, 1972 (see Appendix to Jurisdictional Statement of State Appellants, pp. 44-45).

he issue of jurisdiction will be discussed in Point I of is brief.

STATUTES INVOLVED

The relevant provisions of the New York State Social rvices Law and regulations of the New York State Dertment of Social Services are set forth in the Appendix, . 47-49, 117-134, 214-215.

QUESTIONS PRESENTED

1. Did Congress intend the federal Work Incentive ogram to be the only program applicable to recipients AFDC and AFDC-U, and to preempt state programs d requirements for work referral of persons either not gible for referral under the WIN Program or for whom ere are no employment or training positions available der the federal programs?

2. Did Congress intend to permit employed persons quit their jobs or reduce their income without good use and nevertheless qualify for AFDC benefits?

STATEMENT

Plaintiffs, suing on behalf of themselves and their mir children, commenced this action seeking to have apters 101 and 102 of the New York Laws of 1971, and rules promulgated pursuant thereto, declared unconstitutional, alleging that they violated the Thirteenth endment to the Constitution of the United States, the e Process and Equal Protection Clauses of the Fourenth Amendment and so conflicted with the Federal Sol Security Act of 1935, as amended, that they were in lation of the Supremacy Clause of Article VI of the

Constitution. The complaint sought an injunction restraining enforcement and implementation of the statutes.

In brief, the Work Rules require employable recipients of public assistance, including recipients of Aid for Dependent Children (AFDC), to report semi-monthly to the New York State Employment Service to pick up their assistance checks and accept referrals to employment positions if available. A companion statute, §131(10) of the Social Services Law, enacted by Chapter 946 of the Laws of 1971, and its implementing regulations, §385.6 (A. 126), disqualifies for 30 days 3/ a person who voluntarily terminates employment without good cause.

The complaint (A. 17) did not expressly seek to enjoin the enforcement of §131(10) of the Social Services Law or Chapter 946 of the Laws of 1971, but the permanent injunction granted by the district court did enjoin the enforcement of all of part 385 of the State Regulations, which includes the regulation implementing §131(10) of the Social Services Law.

The District Court permanently enjoined and directed the defendants to cease all enforcement of the New York Work Rules against recipients of and applicants for AFDC in the State of New York.

The statutes in question had been enacted by the Legislature of the State of New York as a part of a welfare reform program recommended by the Governor in a Special Message to the legislature in March, 1971. The purpose of the legislation, according to Governor Rockefeller was:

> "to give greater opportunity and incentive to the individual to achieve independence, self-

---

3/ The State's regulation construed federal law to limit the penalty to 30 days, the statute having allowed a 75-day penalty unless federal law otherwise provided.

sufficiency, and human dignity . . . My purpose in recomending far-reaching reorganization proposals is to see to it that we not only continue to meet the basic needs of those who cannot do for themselves, but that we also encourage the young and able-bodied, temporarily in need of assistance through no fault of their own, to achieve the education and the skills, the motivation and the determination that will make it possible for them to become increasingly self sufficient, independent citizens who can contribute to and share in the responsibility for their families and our society."

The basic philosophy of the work referral program was clearly stated by defendant Commissioner Wyman (Exhibit 44):

"Some people talk of work as a demeaning demand, a beyond-reason expectation that detracts and denies the individual the meaning ing of freedom and the exercise of choice. But work is not an obligation that makes less of a man, but rather it makes more of a man. When a man loses a job, he loses more than money. Work is more than a provision of income--although too many people interpret the work requirement as a cold and callous insistence that everyone must 'work or starve.'

"But work is more than doing a job, putting in time and collecting pay. Work is a source of interest, of friendship, and of activity that gives meaning and fulfillment to life. A graver consequence of loss of job, beyond the curtailment or elimination of income, is that an individual is likely to lose

confidence in himself. People ask what he is doing and where he works. He is reluctant to say he is not working because this might seem to be an admission that he is less effective than other people. His sense of his own prestige is diminished.

"So when work is made a requirement, it is not done in a punitive sense, because there is a personal need for being needed, of having personal worth, of having personal capabilities and talents which are utilized and made productive. Measured in these unchallengeable terms, the work requirement becomes even more important and more necessary to the individual, in addition to the entire system."

Subsequent to the enactment of the statutes, the State Department of Social Services adopted regulations for the implementation of the statutes (A. 117-134). The statutory definition of employable was further defined by the State Department of Social Services for the guidance of the local departments in making determinations as to employability under the statutes. That definition (Regulation 385.1) provides:

"Each ADC or HR applicant or recipient age 16 and over shall be deemed employable except by reason of:

(1) Full-time employment;

(2) Attendance at school including a vocational or technical school, a college or a university, for a minor other than an emancipated minor;

(3) Attendance full-time in grade or high school for an emancipated minor;

(4) Full-time satisfactory participation in

an approved program of vocational training or rehabilitation, which shall include but not be limited to participation in the work incentive program or a two-year college program with specific vocational objective;

(5) Part-time employment to the extent permitted by medical verification, or to the extent permitted by inability to secure adequate care for children or other incapacitated members except on a part-time basis;

(6) Mental or physical illness or incapacity medically verified to be of such significant or substantial nature as to prevent such person from engaging in employment; age shall be a basis of unemployability only when it is verified that the individual is potentially hazardous to himself or others with whom he is associated; and persons with a history of drug addiction shall be deemed employable only when determined medically to be free of drug use, or to be participating in a methadone maintenance program or a rehabilitation program; or,

(7) The need of such person to provide full-time care for other members of such person's household who are verified to be wholly incapacitated or who are children and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the social services district to obtain services or the assistance of others to provide such care."

In determining whether the mother's presence in the home is essential, the local social services district was explicitly instructed to consider:

"(1) The nature and extent of the incapacity; what effect the mother's absence would have on the health and welfare of the incapacitated person; whether other services or the assistance of others is available, and whether such alternative plans would adversely affect the incapacitated person.

"(2) The number of children in the home, their respective ages, the existence of illness, handicap or special needs; what effect the mother's absence would have on the health and welfare of the children; whether an adequate plan of child care is available; and whether such plan of child care would adversely affect the health and welfare of children." (A. 60)

If a public assistance recipient contests his classification as employable, he is entitled to a fair hearing on that issue, without having to first refuse a referral for employment and risk termination or grant reduction for noncompliance.

Subsequent to the initial implementation of chapters 101 and 102, problems which arose in connection therewith resulted in changes in the law and regulations. After the first six months of the operation of the program, the Department of Social Services adopted a new regulation to provide an exemption for semi-monthly reporting requirements for any person with a transportation hardship. In such case, either the local social services district may

arrange transportation for the recipient or provide for reporting by mail. Additionally, the 1972 Legislature made two statutory changes. It exempted from reporting requirements persons engaged in full-time training and vocational rehabilitation programs (Chapter 683, Laws of 1972) and provided that shelter allowances would be paid monthly, rather than as a part of the semi-monthly assistance payments (Chapter 685, Laws of 1972).

The main issue raised by this appeal is whether Congress, in enacting the WIN Program and in providing limited funding for it, intended that this work referral program should supersede and preempt state programs of broader supplemental application. The State of New York does not take the position that persons eligible for and referable to WIN should not be so referred. In fact, the witnesses for the social services departments, State and local, all stated that where public assistance recipients were eligible for WIN referrals and where there were WIN slots available for them, such recipients must be referred to WIN and not through the State program. In intention and operation, therefore, the State program was intended to supplement WIN.

In New York, the WIN Program is restricted geographically in the sense that it exists in only 12 of the State's 58 social services districts. The actual designation of only 12 districts in which the WIN Program is to operate was made by the United States Secretary of Labor. The request of the New York State Department of Social Services that the Federal Labor Secretary expand the WIN program, by designation of additional social services districts for the program, was denied. Unlike New York State's Social Services Law work referral provisions, the WIN program by Federal design is restricted to specific areas of the State. Concededly, these 12 districts included 90 percent of the total number of welfare recipients in the State of New York.

However, the 12 social services districts which have a WIN Program in operation were also limited to a total slot allocation of 16,800 persons. Initially, when the program was implemented in New York in 1968 there were 14,800 slots authorized. In April, 1972, the slot allocation was increased to the present level of 16,800. Under the revised WIN Program, effective July 1, 1972, it is estimated that there are 75,000 registered AFDC recipients who are potential WIN participants but the program will not have the capacity to accommodate all of them.

Appellant has just learned that during the latter part of 1972, the State entered into a new contract with the United States Department of Labor which may expand the number of persons able to participate in the WIN Program; but the number of counties involved in the WIN Program will not expand.

The disparity between the effectiveness and scope of the Federal and State programs is apparent from the fact that in the period from January through June, 1972 there were a total of 2,657 job placements under the WIN Program, as compared with a total of 5,323 placements in the same period under the State's work referral program, even though the WIN Program is operating in those districts having 90% of the total number of welfare recipients in the State.

In fiscal 1971, the New York State Department of Social Services referred 17,511 individuals for participation in the WIN Program. However, in that fiscal year, the Federal government allowed only 9,600 opportunities for enrollment in the WIN Program in New York State. Since the State work requirement was enacted, referrals to the State Employment Service increased twelvefold. Between November, 1971 and June, 1972, there were approximately 125,000 referrals under the work referral program. Compare that figure with the yearly total referrals under

the Federal WIN Program:

Fiscal Year	68-69	9,127
	69-70	16,992
	70-71	17,511

From those figures it can be seen that, as a matter of fact, the WIN Program does not, in operation, occupy the entire field of work referral, nor does it occupy even a major percentage of that area.

SUMMARY OF ARGUMENT

The federal WIN Program was not intended to preempt employment and job training rules applicable to AFDC recipients. The state's program is supplemental to WIN, because any person eligible for WIN must be referred to that program.

The plain language of §402(19)(F) of the Social Security Act would seem to authorize state employment rules not limited to employment procured through WIN.

The U. S. Department of Health, Education and Welfare has advised the federal courts that it does not understand the WIN rules to preempt State work rules aimed at achieving the identical goal through other, non-conflicting mechanisms.

WIN is limited as to federal funds and does not operate in all social services districts. Congress did not intend to preclude other work programs for persons not enrolled or participating in WIN.

The State Work Rules contain adequate procedural safeguards, including fair hearings. Mothers may not be referred without adequate child care plans, although both the mother and the social services district must make "diligent efforts" to obtain such child care.

In short, there is no clear manifestation of a congressional intent to supersede State work requirements.

In any event, the district court should not have enjoined state regulations which preclude AFDC recipients from quitting existing jobs without good cause.

ARGUMENT

I.

If the Complaint contains "substantial" constitutional questions, then this Court has jurisdiction over the direct appeal; if not, then the case should be remanded with directions to dismiss the Complaint for want of jurisdiction.

The plain import of this Court's order postponing the question of jurisdiction is that the question should be fully briefed. Rule 16, Par. 6 of this Court; Slagle vs. State of Ohio, 366 U.S. 259 at 264 (1961).

One requirement for the convening of a three-judge court is that the constitutional question presented be substantial. See Flast vs. Cohen, 392 U.S. 83 at 91, fn. 4 (1968). It seems well settled that if the three-judge court has jurisdiction by reason of the presence of a substantial constitutional question, its jurisdiction extends over all other grounds of attack against the State Statute, including a preemption claim. The joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene a three-

judge court. Florida Lime & Avocado Growers, Inc. vs. Jacobsen, 362 U.S. 73 at 80-81, 84 (1960); U.S. vs. Georgia Public Service Commission, 371 U.S. 285 at 287-288 (1963); Paul vs. U.S., 371 U.S. 245 at 250 (1963); Zemel vs. Rusk, 381 U.S. 1 at 5-6 (1965); Flast vs. Cohen, 392 U.S. 83 at 90-91 (1968).

Once convened, the case can be disposed of in the District Court or in the Supreme Court on any ground, whether or not it would have justified the calling of a three-judge court. U.S. vs. Georgia Public Service Commission, supra, 371 U.S. at 287-288. Indeed, in Rosado vs. Wyman, 397 U.S. 397 (1970), this Court held that the three-judge court was obliged to adjudicate the statutory claim in preference to deciding the original constitutional claim (397 U.S. at 402). 4/

Nothing in Swift & Company vs. Wickham, 382 U.S. 111 (1965) changed these well settled principles. In that case the Court held that the constitutional claims alleged in the complaint were "too insubstantial to support the jurisdiction of a three-judge court." (382 U.S. at 115). Thus, the only remaining basis for enjoining enforcement of the state statute was its asserted conflict with the federal statute. On that state of facts, the Court held that no three-judge district court was required. But the Court

---

4/ The further holding in Rosado vs. Wyman that the three-judge court had power to remit the supremacy issue to a single district judge is not inconsistent with the cited decisions of this Court. Rosado did not hold that such remand to a single district judge was mandatory. In the instant case, pending in the Western District of New York and not in one of the more populated districts, the three-judge court properly exercised its discretion to retain jurisdiction over the supremacy question.

was careful to distinguish Florida Lime & Avocado Growers, Inc. vs. Jacobsen, supra, in fn. 17 of its opinion, (382 U.S. at 122), and the Court has cited and followed the Florida Lime case in the several cases cited above, including Flast vs. Cohen, supra, which was decided three years after Swift vs. Wickham, supra.

As to whether the complaint presents a substantial constitutional question, it will be recalled that the District Court below determined this question in the affirmative (A. 38). Those constitutional questions have been briefed by the plaintiffs in their jurisdictional statement on their cross appeal in No. 72-5939, and by the state appellants on their motion to dismiss or affirm the plaintiffs' appeal. As of the writing of this brief, the Court has not determined that motion or noted probable jurisdiction.

If the Court should find that the constitutional questions pleaded in the complaint are so insubstantial as to compel reading them out of the complaint (see Zemel vs. Rusk, supra, 381 U.S. at 6), then there would be presented the further question as to whether the District Court lacked subject matter jurisdiction over this action. Plaintiffs have relied upon 42 U.S.C. §1983, and its jurisdictional compliment, 28 U.S.C. §1343. The Court of Appeals for the Second Circuit held recently that to establish jurisdiction under 28 U.S.C. §1343(3), "a substantial constitutional claim must be advanced". Hagans vs. Wyman, __F. 2d__, decided January 3, 1973, citing Almenares vs. Wyman, 453 F.2d 1075, 1082 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972). In the Almenares opinion, the Court of Appeals said that it regarded the substantial constitutional claim requirement "as essential for jurisdiction under §1343(3) in the circumstances here presented, since in our view the Social Security Act is not an 'Act of Congress' providing for equal rights of citizens or of all persons within the jurisdiction of the United States" (453 F. 2d at 1082, fn. 9).

If there was a complete lack of subject matter jurisdiction in the District Court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the judgment of the three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. Piedmont & Northern R. Co. vs. U.S., 280 U.S. 469 (1930); cf. Bailey vs. Patterson, 369 U.S. 31 (1962).5/

Finally, if for any reason the Court should hold that the three-judge court was improperly convened but that a single-judge district court would have subject matter jurisdiction under 28 U.S. Code §1343(3) or otherwise, then appellant would request the Court to vacate the final judgment and remand the case to the District Court so that it may enter a fresh judgment from which appellants may perfect timely appeals to the Court of Appeals. Phillips vs. U.S., 312 U.S. 246 (1941); Pennsylvania Public Utility Commission vs. Pennsylvania R. Co., 382 U.S. 281 (1965); Wilson vs. City of Port Lavaca, 391 U.S. 352 (1968); Rockefeller vs. Catholic Medical Center, 397 U.S. 820 (1970); Board of Regents vs. New Left Education Project, 404 U.S. 541 (1972).

5/ The appropriate standards for determining the existence of a "substantial" constitutional question have been the subject of several fairly recent and not entirely consistent decisions by Courts of Appeals, who are obviously troubled by this requirement and the application thereof to specific cases. See, e.g. Johnson vs. New York State Education Department, 449 F.2d 871 (2d Cir. 1971), remanded to determine mootness, __U.S. __ (1972).

II.

The Federal Work Incentive Program was not intended to preempt State Employment and Job Training Rules that purport to govern eligibility for AFDC and AFDC-U Benefits.

The District Court's judgment directed the defendants to "cease all enforcement of the New York Work Rules against recipients of and applicants for AFDC in the State of New York." (Final Judgment, Par. 2). The practical effect of that judgment is two-fold. First, the state is precluded from requiring unemployed but employable AFDC applicants or recipients to accept appropriate employment and job training other than in the WIN Program. Secondly, the state is precluded from withholding assistance to any AFDC applicant or recipient who voluntarily terminates existing employment. Thus, the judgment appealed from authorized thousands of AFDC recipients in the State of New York who are clearly employable persons, with adequate child-care plans but who are not WIN participants, to refuse available employment, and, indeed, even to quit existing employment, to sit idle without any good cause and collect public assistance.

The District Court apparently concluded that any state requirement precluding an AFDC recipient from terminating existing employment without good cause was an additional eligibility standard not authorized by the Federal Social Security Act and therefore invalid under Townsend vs. Swank, 404 U.S. 282 (1971) and similar cases.

It is submitted that inadequate weight was afforded to the plain language of 42 U.S.C. §602 (19)(F), whereby individual aid may be reduced (or, in one instance eliminated) whenever an individual has been found by the Secretary of Labor to have refused without good cause to

ticipate in a project established under the Work Incen-
e Program, or has "refused without good cause to ac-
t employment in which he is able to engage which is
ered through public employment offices of the State, or
otherwise offered by an employer if the offer of such
ployer is determined, after notification by him, to be
ona fide offer of employment". This statute is not
ited to employment procured through the WIN Program.
Aguayo vs. Richardson, __F. 2d__, decided January
1973, the Court of Appeals for the Second Circuit
nted to this issue at p. 1587 of its slip opinion. The
urt said that §602(a)(19) appears to have been general-
read as limited to persons participating in WIN Pro-
ms, citing only Woolfolk vs. Brown, 325 F. Supp. at
9. The Second Circuit, however, assumed, without
iding, that the Woolfolk construction of the statute was
rect (Slip opinion, p. 1587). Examination of the Wool-
k opinion at page 1169 does not disclose any substantial
son requiring such a limited interpretation of §602(a)
). An intent to allow employed AFDC recipients or ap-
cants to quit existing jobs without good cause should
be imputed to Congress in the absence of the clearest
gressional statements of intent. This Court has al-
ys required a clear manifestation of congressional in-
tion to supersede the exercise of power by a state.
wartz vs. Texas, 344 U.S. 199 at 202 (1952); Florida
ne & Avocado Growers, Inc. vs. Paul, 373 U.S. 132
63) at 146.

Accordingly, the State of New York should not have
n enjoined from enforcing that portion of its regula-
n 385.6 (A. 126) [renumbered 385.7] which penalizes
erson who voluntarily terminates employment or re-
es his earning capacity for the purpose of qualifying
assistance or a larger amount thereof. It may be
ed that in New York, unlike the Virginia Work Rules
Woolfolk vs. Brown, supra, non-compliance affects
y the eligibility of the person who refuses to comply,

not the eligibility of the entire family.

The District Court relied upon 42 U.S.C. §602(a)(8), which disallows the so-called 30-1/3 exemption of earned income to any person who in the preceding 30 days has either deliberately reduced earning capacity, quit a job or refused to accept employment offered him by the State Employment Service. The fact that Congress installed a penalty in connection with the enactment of the income exemption does not demonstrate that Congress intended this penalty to be exclusive, or to preclude the loss of all welfare assistance for thirty days, which is the penalty imposed by New York Law. Indeed, the loss of the income exemption to an unemployed person without any income is hardly a penalty.

A second instance involving clear congressional approval of state work requirements, apparently overlooked by the court below, is found in the federal statute relating to the AFDC-U program. It is clear from paragraph 1 of the District Court's final judgment that the Court intended to enjoin application of the New York Work Rules to all applicants for and recipients of AFDC-U (The Unemployed Parent Program). Yet the Court below did not even discuss 42 U.S. Code §607(b), which requires a state plan for such program to preclude assistance to any father who "has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment". No consideration was given to a pertinent report of the Senate Committee on Finance relating to §607(b) which report stated:

> Your committee's bill, as does the House-passed bill requires that a State agency administering the expanded aid to dependent children program must enter into cooperative arrangements with the State agency administering the public employment offices looking toward the

employment of the unemployed parents of the children receiving aid. The arrangements which the State public assistance agency will need to have with the employment service must include provisions for appropriate registration for work and periodic reregistration of the unemployed parent of a child and for otherwise making maximum utilization of the job placement services and other services and facilities of the employment office. The purpose of this provision is, so far as possible, to secure employment for the unemployed person in any jobs that may be available which there is not good cause for him to refuse as determined by the State.

Your committee believes that an unemployed individual whose family is receiving aid under this program should accept any reasonable offer of employment. Accordingly, the bill would require that a State plan include provisions to assure that aid is not provided if, and for as long as, the unemployed parent refuses without good cause to accept employment in which he is able to engage. Considerable latitude would be left to the State in determining the period during which assistance would be denied. It is not intended to permanently disqualify the family during subsequent periods when no offer of employment is available. The state would determine whether the parent had good cause for refusing an offer of employment.

(87th Cong., 1st. Sess., p. 3 (1961)).

he Court below also did not have the benefit of the s of the United States Department of Health, Educa- and Welfare with respect to the alleged conflict

between the Federal Work Incentive Program and the New York State Work Rules. However, in another case raising substantially the same issues, Jefferies vs. Sugarman, on appeal to the Court of Appeals for the Second Circuit, the U. S. Department of Health, Education and Welfare submitted a brief in response to a request from the Panel contending "that there is no federal rule or policy which prohibits a state from imposing non-WIN work requirements for AFDC, although, of course, such requirements could not be such as to distort the operation or defeat the purposes of the WIN Program...HEW continues to regard such work requirements as permissible under the terms of the Social Security Act and implementing federal regulations. Indeed, independent State initiatives aimed at encouraging welfare applicants and recipients to accept paying jobs as a complete or partial alternative to public assistance would appear to advance rather than undermine the overall congressional objective implicit in the WIN Program, both by filling in gaps in particular WIN programs and by promoting the goal of employment in areas where the WIN Program has not yet been fully developed." The HEW brief specifically noted the opinion in the Court below, as well as the opinion in Woolfolk vs. Brown, 325 F. Supp. 1162, affirmed, 456 F. 2d 652 (4th Cir. 1972), cert. denied, __U.S.__(1972). HEW said "We do not agree with this interpretation of the federal statute, and believe that the cases cited were wrongly decided." With respect to the 1971 amendments to the WIN Program, commonly known as the Talmadge Amendments, HEW argued that:

> "The main purpose of these changes was obviously to strengthen the federal aspect of the WIN program and to tighten up its operation by the states. There is, however, nothing in the legislative history of the Talmadge amendments to suggest a congressional purpose to reduce or eliminate the area of permissible non-WIN state

work requirements for AFDC. In fact, given Congress' obvious interest, as evidenced by the Talmadge amendments, in stimulating greater efforts in the direction of developing the employment potential of welfare recipients through the WIN program, it would be fanciful to conclude that Congress was concerned at the same time to restrict state activity aimed at achieving the identical goal through other, non-conflicting, mechanisms.

Since the Talmadge amendments were enacted primarily to reinforce federal control over the content of state WIN programs, and not to preempt independent state work requirements, the argument advanced in the attached Woolfolk brief that WIN does not occupy the field of AFDC-related work programs is as applicable now as it was when it was written. Thus, it is still our view that the mere existence of the WIN program under the Social Security Act does not render non-WIN state work requirements invalid."

Congress knew that under 42 U.S.C. §632(a), the Secretary of Labor would establish work incentive programs only in those state political subdivisions in which the Secretary determined "there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children" and that "in other political subdivisions, he [the Secretary of Labor] shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established." In New York State, the WIN Program was established by the Secretary of Labor in only 12 of the state's then 64 (now 58) social services districts. The Secretary refused to

authorize additional WIN Programs in the other districts. Adequate transportation is not available to enable recipients in districts without WIN Programs to travel to one of the 12 available programs. Yet, the district court's judgment precludes the state from implementing its work referral program even in those districts in which there is no WIN Program in operation.

Between 1967 and 1972, the 12 WIN Programs in operation in the State of New York were only authorized to service a maximum of 16,800 persons. Yet, there were an estimated 75,000 or more registered AFDC recipients who were potential WIN participants but who could not be served because the WIN Program did not have capacity to accommodate them. Appellant has just learned that the New York State Department of Social Services and the U.S. Department of Labor recently entered into a contrace which will permit more persons to be serviced under the WIN Program. But the vicissitudes in the annual availability of federal funds to provide sufficient slots in the WIN Program merely serves to emphasize that Congress in 1967 did not intend to have the question of preemption turn upon the sufficiency of funds available in future years. It is far more likely that Congress did not intend to preclude the states from requiring AFDC recipients not enrolled in and participating in the WIN Program to comply with another work referral program.

The court below noted that "As an incentive, WIN enrollees in assessing their welfare needs are permitted to disregard the first $30.00 of their monthly earned income and one-third of the remainder." (State appellants' Jurisdictional Statement, p. 26). But all earned income of AFDC recipients is subject to the so-called 30 and one-third exemption under the State's regulations. 18 N.Y.C.R.R., §352.20(b)(2).

The court below noted that "Compulsory referral of the aged, or those required at home for other reasons,

is prohibited" (State appellants' Jurisdictional Statement, p. 26). But the state statute and state regulations contain similar exemptions. 18 N.Y.C.R.R., §385.1(a); State Social Services Law, §131, subdivision 4.

The court below held that "in contrast to the complex WIN referral procedures, with the use of appropriateness determinations, employability teams, and personal development plans, the screening procedures of the Work Rules are substantially less elaborate." (State appellants' Jurisdictional Statement, pp. 26-27). The court noted that one study of the state's program had found over 67% of a sample of persons to have been improperly referred to the state employment service because they were in fact unemployable. The short answer is that the state required its local social services districts to implement the new Work Rules Program in 1971 on very short notice of less than a month; and it is not surprising that administrative errors may have occurred in some local social services districts. But those errors were remedied when they were discovered or when the welfare recipients complained. In other cases, temporary restraining orders as to such persons were obtained by the plaintiffs in this proceeding and the local districts were not even afforded an opportunity to take other action on those cases. In any event, the initial administrative burden of implementing the Work Rules as to tens of thousands of recipients was overcome and there is no substantial reason why any initial administrative errors in some localities should form a basis for permanently enjoining the operation of the entire state program for all time.

The court below noted that "Adequate child care must be assured for working mothers as a precondition of WIN referral." (State appellants' Jurisdictional Statement, p. 26). But the state's program contains virtually identical assurances of adequate child care in 18 N.Y.C.R.R., §385.3(b)(3). A 1972 amendment to §131, subdivision 4

of the State Social Services Law provides:

> "For the purposes of this subdivision and subdivision five, a person receiving or applying for aid to dependent children shall be deemed employable in accordance with the provisions of section three hundred fifty-e of this chapter, except that a mother who is unable to work by her need to provide full-time care for her children, and for whom required care is not otherwise reasonably available notwithstanding diligent efforts by such mother and appropriate social services department to provide such care shall not be deemed employable." (Chapter 941 of the Laws of 1972).

Plaintiffs have argued that the New York Work Rules impose an unlawful condition with regard to child care insofar as those rules require the employable mother to make "diligent efforts" to secure such care. Actually, the law as amended requires concurrent diligent efforts by such mother and the appropriate social services department. There is nothing, in any event, in the federal WIN statute that would exonerate a mother from making diligent efforts to obtain child care so that she may participate in a work referral program, under WIN or otherwise. Plaintiffs' criticism of the "diligent effort" requirement is ample evidence that plaintiffs are most interested in obtaining a public assistance program under which mothers are exempt from any work requirements, by the device of claiming that they do not have child care available to them. It is submitted that the "diligent effort" requirement under state law was eminently fair and reasonable and does not impose any undue hardship upon any AFDC recipients.

The administration of the "diligent effort" requirement with respect to child care is also pertinent. In Onondaga County, for example, the testimony shows (A. 11, Docket

entry for January 18, 1972, deposition of Philip C. Pinsky) and exhibit 27 (A. 204) confirms that since child care demand far exceeded its supply, the County Department of Social Services did not attempt to treat as "employable" any mother who failed to obtain child care by her own efforts. This administration of the statute demonstrates that the "diligent effort" requirement can be reasonably administered without substantial detriment to AFDC mothers. Obviously, there is always the possibility of administrative error, but fair hearings required under state and federal law are available to correct those errors, if they should occur.

The court below noted that "Under WIN, the recipient is entitled to a hearing, prior to referral, on the issue of appropriateness of referral." (State appellants' Jurisdictional Statement, p. 26). But the state's practices afforded a fair hearing on the issue of employability under the state referral program, as the court noted in its opinion (State appellants' Jurisdictional Statement, pp. 32-33). A recipient may test the correctness of his classification as an employable person without first being discontinued from public assistance. There is no substantial conflict, then, in this regard between the WIN Program and the state's program.

In a case recently decided by the Court of Appeals for the Second Circuit (Aguayo vs. Richardson, decided January 18, 1973), the Court was concerned by the provisions of New York State's regulation 385.7. (formerly regulation 385.6 and printed at A. 126) which provides that if a recipient refuses employment, he shall be disqualified for thirty days thereafter and until such time as he is willing to comply. The Court said "This seems to mean that even if the recipient accepts the determination of the hearing and is willing to take a referral immediately, he would nevertheless be deprived of assistance for 30 days" (slip opinion, p. 1591). The Court refrained

from deciding the problem on the motion for a temporary injunction, in light of an almost "total absence of briefing" by the state defendants (slip opinion, p. 1593). But the Court did pose the problem as follows:

> "The question of the constitutionality of §385.7 has its difficulties. Presumably, the argument in favor of the thirty-day suspension is that it constitutes the only effective sanction against the assertion of claims for a hearing in every case, with a consequent breakdown of the entire work program, since otherwise an adverse determination would simply require the recipient to do what he should have done long before. Yet, a somewhat similar argument concerning proliferation of hearings did not win favor in Goldberg vs. Kelly, 397 U.S. 254, 265-66 (1970), on the issue there presented. Appellants argue that the necessitous circumstances of welfare recipients make the risk of a thirty-day suspension, even for the one family member concerned, totally unacceptable; as a practical matter, the suspension thus operates as a denial of a hearing before an unemployable recipient, or one with good cause for refusal, is forced to accept employment, with possible drastic results for his children." (Slip opinion, pp. 1592-1593).

The Onondaga County appellant is not in a position to bind the State of New York on an appropriate construction of the state's regulation 385.7 that might resolve this issue.

If there is any deficiency on this score, or with any other specific aspect of the work rules that can be excised without invalidating them entirely, the Court is urged to prune the offensive portions without enjoining the entire statute and regulations.

Plaintiffs claimed at page 25 of their motion to dismiss or affirm that the WIN Program provides "extensive services" to participants. As the Court of Appeals noted in Aguayo vs. Richardson, supra, slip opinion at 1578-79, fn. 23, the WIN Program in no way guarantees the availability of these services. The Court said:

> "Indeed, the HEW WIN Handbook, §80.6 (1972) states that the only service which must be provided before certification under 42 U.S.C. §602(a)(19) is a medical examination, and that the only service which must be available before entering a work project is child care."

Both of those services are provided in New York State.

Finally, it bears repetition that the state program does not supersede the WIN Program and that persons eligible for WIN must be referred to WIN whenever there are WIN slots available. This means that the persons subject to state penalties not exactly paralleling the WIN Program--as, for example, the lack of a 60-day counselling period prior to termination of assistance--are not WIN participants and are not entitled to every procedural protection designed for WIN participants. Certainly, the variance in the procedural requirements between the state program and the WIN Program is not a sufficient basis for finding that the state program is barred by the Supremacy Clause.

It is anticipated that other alleged conflicts between the State Work Rules and the WIN Program will be discussed in the brief of the State appellants. No good purpose will be served by duplicating those arguments.

CONCLUSION

The judgment of the District Court should be reversed, or in the alternative the case should be remanded with instructions to dismiss the complaint for want of jurisdiction.

Respectfully submitted,

PHILIP C. PINSKY, ESQ.
Onondaga County Welfare Attorney
Counsel for Appellants, Onondaga County Department of Social Services and its Commissioner, John L. Lascaris
600 South State Street
Syracuse, New York 13202
Tel.: (315) 477-7125